WAGNER EQUIPMENT CO.

IBLA 88-440 Decided October 22, 1990

Appeal from a decision of the Grand Junction, Colorado, District Office, Bureau of Land Management, finding Wagner Equipment Company in default as to payment of rentals due and owing for right-of-way C-22668 and holding the right-of-way for cancellation.

Vacated.

1. Rights-of-Way: Generally--Rights-of-Way: Cancellation--Rights-of-Way: Conditions and Limitations

   If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization auto-matically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

APPEARANCES: Paul Matthews, Grand Junction, Colorado, for Wagner Equipment Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Wagner Equipment Company (Wagner) has appealed from an April 12, 1988, decision of the Grand Junction, Colorado, District Office, Bureau of Land Management (BLM), that right-of-way C-22668 was relinquished and that $375 was due and owing as unpaid rental.

The facts in this case are not in dispute. On October 28, 1975, right-of-way C-22668 was issued to the McCoy Company. The assets of the McCoy Company were sold to Wagner, and on February 9, 1976, the assignment of the right-of-way to Wagner was approved by BLM. In 1980, BLM reappraised the right-of-way and issued its June 18, 1980, decision increasing the rental to $300 per year and amending the right-of-way agreement in two respects. The first amendment was to change the language of Item 8 of the "Details of Grant" to provide that $300 per year advance rental was to be paid on or

before each October 28 anniversary date. The second amendment deleted Stipulation 12 in its entirety and substituted the following language in its place:

> Payment in advance, annually of the fair market value of the right-of-way as specified in item "8. Details of Grant." Fail-ure to pay said amount in a timely manner results in summary termination of this grant without an administrative proceeding. The Bureau of Land Management reserves the right to review the fair market value determination at reasonable intervals, and to adjust it in accordance with regulations and procedures in effect at that time, if necessary, to insure the payment of full fair market value of the right-of-way to the United States. [Emphasis added.]

The June 18, 1980, decision also provided that, unless appealed, it would be final 30 days after receipt. No appeal was taken and the decision became final on July 21, 1980.

An additional reappraisal was made in 1985 and the rental was reduced to $250 per year. No amendments to the right-of-way document were made at that time.

On March 10, 1988, BLM issued a notice to Wagner that Wagner was in default. The notice stated that Wagner was "in default as to payment of $500 for the rental period October 28, 1986 to October 27, 1988," and that BLM was holding the right-of-way for cancellation. Wagner was allowed 30 days to submit the amount due and owing, and the notice specifically provided that, if Wagner failed to submit the stated amount, the right-of-way would be cancelled.

On March 31, 1988, Wagner responded, stating that in 1981 it had removed all radio equipment from the right-of-way site, and that it had believed that all matters concerning the site had been resolved. Wagner stated that it had no further interest in the site and indicated that it had no desire to continue holding the right-of-way.

The District Office responded on April 12, 1988, noting receipt of the March 31 letter, stating that it would consider the letter to be a relinquishment of the right-of-way, and amending its March 10 notice by adjusting the amount owed to $375. This adjustment reflected the relin-quishment by calculating the rental from October 28, 1986, through March 31, 1988. After directing Wagner to make payment to the Grand Junction Office, BLM stated that relinquishment would be formally accepted upon receipt of payment.

Wagner's notice of appeal, which was received on May 9, 1988, included its statement of reasons for appeal. Wagner contends that its equipment was removed in 1981 and it has not used the site since that date. Wagner

states that between 1981 and 1986 it had erroneously continued to make rental payments in excess of $1,000, but had ceased doing so in 1986. It
states its opinion that BLM had been adequately compensated, and no further rental should be considered due and owing.

[1] To determine whether back rentals are due and owing, we must first consider the effect of Wagner's failure to make timely payment of rental on or before October 28, 1986. The applicable regulation, found at 43 CFR 2803.4(a), 1/ provides:

> If the right-of-way grant or temporary use permit provides by its terms that it shall terminate on the occurrence of a fixed or agreed upon condition, event, or time, the right-of-way authori-zation shall thereupon automatically terminate by operation of law, unless some other procedure is specified in the right of way grant or temporary use permit.

This language is remarkably similar to the statutory language found at 30 U.S.C. § 188(b) (1988), addressing the consequences of failure to make a timely payment of rental for an oil and gas lease. That statute provides that "upon failure of a lessee to pay rental on or before the anniversary date of the lease * * * the lease shall automatically terminate by opera-tion of law." Lease termination automatically occurs pursuant to the statute when the rent is not received, and is not dependent on or a result of administrative action. Mark Salisbury, 107 IBLA 335 (1989); Herbert J. Stinnett, 91 IBLA 239 (1986).

We find these cases instructive. If the governing language provides for automatic termination when the rent is not received, termination is not dependent on or a result of administrative action. BLM amended the granting document in 1980 to provide that "failure to pay said amount in a timely manner results in summary termination of this grant without an administrative proceeding." As a result, the right-of-way held by Wagner terminated by its terms on October 28, 1986. Having terminated by opera-tion of law on October 28, 1986, no rentals accrued between October 28, 1986, and March 31, 1988. Moreover, appellant's unrebutted statement is that the right-of-way was not used at any time during that period and "no equipment was onsite and no service was provided" (Notice of Appeal and Statement of Reasons at 1). 2/ No rental is owing. See and compare Roy L. Parrish, 114 IBLA 336 (1990); D. R. Johnson Lumber Co., 106 IBLA 379 (1989).

1/ But for the express language of the grant, the regulation found at 43 CFR 2803.1-2(d) would have been applicable.

2/ The record also shows that an initial, nonreturnable deposit of $100 was made in acquisition of the subject right-of-way "as reimbursement for costs incurred by the United States in monitoring the construction, opera-tion, maintenance, and termination" of the right-of-way grant. Item 11, Terms and Conditions of Grant, Oct. 28, 1975 (emphasis added).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated.

R. W. Mullen
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge